IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.325 OF 1990.

1. Dagdu Daulata Lakde

2. Smt. Rukminibai Uttam Ladke

both residing at Katraj,
Tal : Karmala,
District : Solapur. .. Appellant

vs.

Jagannath Daulata Lakde
res. at Katraj,
Tal : Karmala,
Dist : Solapur
through his power of Attorney holder
son- Ajinath Jagannath Lakde,
residing at Katraj,
Tal : Karmala,
Dist : Solapur. .. Respondent.

Mr.V.V.Savaji with Prafulla B. Shah, Advocate for the Appellants.

Mrs.S.A.Mudbidri, Advocate for the Respondent.

CORAM : S.R.SATHE, J.

DATED :18TH AUGUST, 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Court of 4th Additional District

Judge, Solapur in Civil Appeal No.567 of 1987, whereby the order passed by the Court of Civil Judge, Junior Division, Karmala in Regular Civil Suit No. 101 of 1984 dismissing the plaintiffs' suit for partition and possession was set aside and the appeal was allowed, the original defendants have preferred this appeal. (For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendant.)

2. Brief facts giving rise to this second appeal are as under :

. The suit land admeasuring 4 Hectares and 91 Ares, 12 Acres and 11 gunthas situated at Village Katraj, Tal : Karmala, Dist : Solapur was with the father of the plaintiff and defendant no.1 namely Daulata Hari Lakde. Daulata died on 6.2.1957. After his death, the name of the defendant No.1 Dagdu was entered in the record of rights as manager of a joint family and he started cultivating the said land. The said family was also having some other agricultural land. Partition took place between the plaintiff and

defendant no.1 in the year 1968-69. However, at that time the suit land was kept common as at the relevant time litigation was going one under B.T.L. Act. Thereafter, according to plaintiff defendant no.1. entered name of defendant no.2 for the said land in the record of rights. The plaintiff, therefore, filed the present suit for partition and possession.

. The defendants filed their written statement at exhibit 11 and contended that the partition of the joint family property has infact taken place in the year 1962 and at that time the suit land was alloted to the defendants share. They also contended that all along defendant no.1 has paid the necessary taxes and has also incurred expenditure for the improvement of the said land. Defendants further contended that in the year 1962 the plaintiff had infact surrendered his rights in the suit property and as such the plaintiff is not entitled to have any share in the same. The defendants also contended that in the High Court the matter was compromised and in pursuance of the same defendant no.1 purchased the land in 1975.

The defendants further contended that at no point of time the land was being cultivated by the plaintiff. They, therefore, prayed for dismissal of the suit. On these pleadings the learned trial judge framed issues at exhibit 12 and after considering the evidence the trial court held that the suit land was allotted the share of the defendant in the partition which took place in 1962. Subsequently the said land has been purchased by the defendant no.1. He therefore held that the plaintiff has no share in the suit property and dismissed the suit.

. Being aggrieved by the same the plaintiff filed Civil Appeal no. 567 of 1967 in the District Court, Solapur. After hearing both the parties, the first appellate court came to the conclusion that the said land was a joint family property of plaintiff and defendant no.1 and though partition had taken place in the year 1962, the suit land was kept common and as such the order passed by the trial court was incorrect. He, therefore, allowed the appeal and decreed the suit for partition and possession. Being

aggrieved by the said order the original defendant no.10 filed this second appeal.

3. From the perusal of the record it appears that while admitting the appeal this court has passed the order "Admit on ground no.1, 17, 21 which are substantial questions of law". The said substantial grounds are mentioned as under:

> " 1. The learned Appellate Court has failed to interprete the document, that is, Mutation Entry No.447 at Exh.49 properly;
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> 17. The learned appellate court has failed to consider that after the death of the father of the plaintiff and defendant no.1 name of the defendant no.1 was entered in the record of rights by Mutation entry no.292 as the Manager of the Joint Family. This mutation entry took place in the year 1957. It is admitted that after the death of the father of the plaintiff and defendant no.1, defendant no.1 was looking after the affairs of the family as manager and, therefore, in the year 1957 his name was entered in the record of rights as manager of the Joint Hindu Family. After 1962 partition took place between the plaintiff and the defendant no.1 and thereafter defendant no.1 ceased to be a manager of the joint family. However, old entry remained to continued in the record of rights and, therefore, the name of the defendant no.1 appears to be as a manager of the joint family in the record of rights. But mere name of the defendant

> no.1 as Manager of the joint family in the record of rights will not take away his right which he has acquired on partition between himself and the plaintiff in 1962 and the right acquired by him by way of registered sale deed in 1975 in respect of the suit land.
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> 21. The learned appellate court has wrongly drawn an adverse inference for non-production of the compromise decree in respect of the suit land which took place in 1975 - but at the same time it has ignored that there is nothing on the record contradicting the averments made by the appellant defendant no.1."

4. In this appeal before me the learned advocate for the defendant has urged only one point. He submitted that the first appellate court has failed to appreciate the evidence on record and has wrongly interpreted the mutation entry no.447 which is at exhibit 49. He also canvassed before me that the first appellate court has wrongly observed that even after 1962 the suit land was being cultivated by the defendant no.1 as manager of the joint family. He, therefore, submitted that it is necessary to interfere with the said finding and allow the second appeal and dismiss the plaintiffs suit. As against this the learned advocate for the respondent supported the judgment and order passed by the appellate court.

It is an admitted fact that plaintiff and defendant no.1 are real brothers and their father Daulata Hari Lakde was in possession of the suit land as a tenant. It is also not in dispute that Daulata died on 6.2.1957 and thereafter by virtue of the mutation entry no.392 the names of his sons i.e plaintiff and defendant no.1 were entered as heirs of deceased Daulata and at that time the defendant no.1's name was also shown as manager of the joint family. It is the case of plaintiff that partition of the joint family property took place in the year 1968. As against this, the contention of the defendant is that the partition had taken place in the year 1962. It must be mentioned that the plaintiff has infact not produced any evidence to show that the partition took place in the year 1968. The contention of the defendant that the partition took place in the year 1962 appears to be correct. Infact, both the courts below held that the partition of both the properties had taken place in the year 1962. However, the case of the plaintiff is of partial partition. Naturally the burden lies on the plaintiff to prove that though the partition took

place in the year 1962, the suit land was kept common. Admittedly, there is no specific document of partition. Reliance is placed only on the mutation entry no.447 dated 10.4.1968. From the perusal of the said mutation entry it is very clear that the joint family of plaintiff and defendant was having as many as 8 lands and they decided to partition the same and got entered their respective names for 8 anna share. Accordingly, mutation entry no.447 was made wherein it is specifically mentioned that the names of plaintiff and defendant no.1 are recorded to the extent of 8 anna share, all trees are kept common and block no.194 i.e. suit land will be cultivated by Dagdu Daulata Ladke i.e. the defendant no.1. (**ya jaminiwar pratyekachi 68.68 ashi aanewari asun tyatil asnari sarva zade samaik rahatil aani gut no.194 chi jamin Dagdu Daulata yane kul mhanun wahiwatanechi aahe)** thus the main and the material question is whether by the above mentioned entry or endorsement it can be said that suit land i.e.block no.194 was given to the share of defendant no.1 or whether the said land was not at all taken into consideration for partition and

it was kept common as joint family property.

5. It is plaintiff's case that at the relevant time litigation under BTL Act was pending and as such both the parties had decided to keep the suit land common. As the said land was being cultivated by defendant no.1 since beginning and his name was also entered in the record of rights in the other rights column as manager of the joint family, it was mentioned that the said land will be cultivated by the Defendant Daulata as a tenant. Relying on this very entry the defendant has tried to submit that by virtue of this endorsement the plaintiff had infact surrendered his tenancy right in favour of the defendant. However, if we take into consideration the manner in which this entry has been made, it can not be said that it amounts to surrender as contemplated by B.T.L. Act. In the absence of any positive evidence regarding partition , one has to take into consideration all the facts, circumstances and the conduct of the parties and then decide on the preponderance of probabilities as to whether it appears that the partition of the suit land has

infact taken place in the year 1962. It is pertinent to note that after the death of Daulata name of defendant no.1 was entered in other rights column as tenant and manager of the joint family. If really the intention of the parties was to allow block No.194 to defendant no.1 alone then normally after the above mentioned mutation entry the defendant would have taken some furthersteps to enter his name for the said land as a holder. But he had not moved revenue authorities to delete his name as manager of the joint family. However, we find that no such steps were taken by the defendant. There is nothing to show that alleged partition has been acted upon. So, it indicates thereby that partition must not have taken place as contended by defendant no.1.

6. Much is made about the fact that the defendant no.1 had spent huge amount for carrying out development in the suit land and the revenue assessment was also paid by him. Not only that, in the year 1975 the defendant no.1 purchased the said land from the owner, after the matter was compromised in the High Court. I am infact unable

to know as to what was the exact litigation before the High Court and in what terms the matter was compromised. If really the said litigation would have been fought by the defendant no.1 in his independent capacity and not as a manager or if there would have been any evidence to show that partition had taken place as contended by him, then he would not have failed to produce such evidence. However, we find that no such evidence is forthcoming from the defendant and as a result of the same the first appellate court has drawn adverse inference. Of course, one thing is certain that after the said compromise mutation entry no.740 was made and from the said entry one can gather that the land in question has been purchased by the defendant no.1. It must also be noted that though it was the contention of the defendants that all along he was paying revenue assessment, incurring the expenditure for the land and ultimately he paid the entire consideration amount, we find that no specific cogent evidence is adduced by defendant in this behalf. Though the plaintiff had alleged that the amount was paid by him to the defendant for purchase of the land,

no evidence is adduced in that behalf. It was tried to be argued that the defendant no.1 has infact incurred huge expenditure and has converted the land from jirayat to bagayat. However, we find that the defendant has not produced any cogent evidence to establish the said contention. So, even if we assume for the sake of arguments that the defendant no.1 has incurred some expenditure for the improvement of land or paid the consideration price, that by itself will not convert the joint family property into his self acquired property. So, having regard to the fact that initially admittedly the land was owned by Daulata Hari Lakde as a tenant and thereafter the names of plaintiff and defendant no.1 were entered as heirs and the land was in possession of defendant no.1 as manager of the joint family, I think that the first appellate court was right in holding that the defendant no.1 failed to prove that the suit land in question was allotted to his share . On the contrary from evidence appears to have been kept common. In this view of the matter there is no substance in this appeal. The appeal is dismissed with costs.

. C.C. expedited.

. The learned Advocate for the appellant submits that during the pendency of this appeal there was stay and as such operation of this order be stayed. Prayer for stay can not be granted but it is is hereby directed that the order of this court is not to be acted upon within four weeks from today.

(S.R.Sathe, J.)